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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 684

JOSEPH F. HUGHES & COMPANY,
a co-partnership composed of
JOSEPH F. HUGHES and E. A. HUGHES,
Petitioners,

vs.

S. RAYMOND MACHEN, TRUSTEE
in Bankruptcy of
CUMMINS CONSTRUCTION CORPORATION,
Bankrupt,
Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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The Daily Record Co., Baltimore 3, Md.

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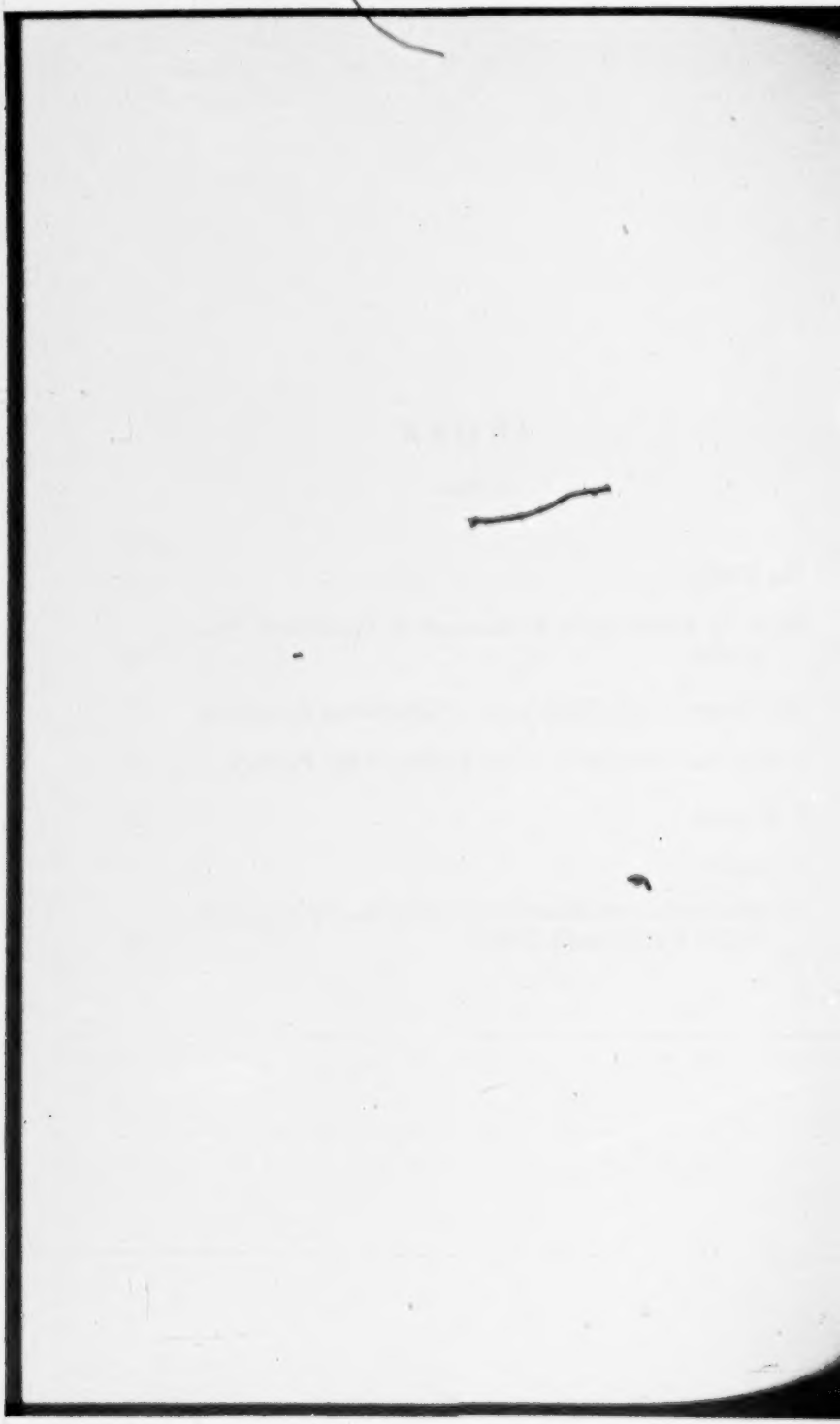

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This case was initiated by a petition of S. Raymond Machen, Trustee in Bankruptcy of Cummins Construction Corporation, for authority to enter into a compromise settlement. After a hearing before the Referee, an order was entered ratifying and approving the settlement (R. p. 14). Petitioner appealed and the District Court approved and confirmed the compromise settlement subject to certain modifications with regard to interest (R. pp. 70-72). The Petitioner then took a second appeal to the Circuit Court of Appeals, which affirmed the District Court

(R. p. 133). Petitioner filed an application for certiorari which was served upon Respondent on March 22nd, 1948. This brief is a response to the said petition and the brief which was attached to it.

THE FACTS

Respondent is not satisfied with Petitioner's statement of facts, and therefore has made a complete restatement. Petitioner's statement is considered in detail in the Appendix.

Prior to bankruptcy, the Cummins Construction Corporation was engaged in substantial construction operations. It was declared a bankrupt on January 4, 1945. The offer in compromise involves transactions which occurred on two dates, both of which were within four months of bankruptcy, to wit, October 16, 1944, and December 6, 1944.

The details of these transactions are set forth in the petition of the Trustee (R. p. 1). On October 16, 1944, the bankrupt was indebted to the Baltimore National Bank on three notes in the amount of $70,000.00. It carried checking accounts in the said bank in the amount of $14,628.76. One of the notes, in the amount of $25,000.00, was to mature on that day.* On the same day, the bankrupt was indebted

* An omission and a typographical error in the Petitioner's Appendix which is repeated in the reprint for this Court (Record 46) should here be noticed. The note here referred to was Trustee's Exhibit No. 5, Sheet 7, a photostat of which appears in the transcript at page 216. The Petitioner's Appendix reprints this note but the date is incorrectly printed "Sept. 11, 1944" rather than "Sept. 14, 1944" as will appear by reference to the photostat. Also the words "Due Oct. 16" which are written in ink above the date on the photostat are omitted. The explanation of the due date is of course that thirty days from September 14th, 1944, was a Saturday, and by statute the note came due on Monday, October 16th. (See Maryland Code, 1943 App., Article 13, section 11.)

on four demand notes to the First National Bank of Baltimore in the amount of $125,000.00; and it carried in its checking accounts at the said bank $53,887.29. The indebtedness to both banks was guaranteed by Albert S. Cummins, President, John R. Cummins, Vice-President, Harold N. Cummins, Secretary, of the Cummins Construction Corporation, and by C. A. Cummins, father of Albert and John Cummins. Mr. C. A. Cummins was not an officer of the corporation, nor was he active in its management (R. pp. 88, 121).

A substantial amount of evidence was taken with regard to the nature of the checking accounts which were carried in each bank. Counsel for the Petitioner was invited to, and did, participate in this hearing, and the officers of the bankrupt were examined under oath. The bank statement sheets of the respective accounts were produced and the corporation's accountant, who was assistant secretary-treasurer, was examined regarding them (R. p. 2 et seq).

On appeal, the Trustee printed a portion of the testimony, relating to the deposit accounts carried at the Baltimore National Bank and the First National Bank as part of his appendix below, and the same is reprinted here. The testimony was thus made available (by the Trustee not the Petitioner) for the reviewing court to determine whether there was substantial evidence to support the findings of fact of the Referee and of the lower courts. However, in the absence of specific analysis of the evidence by the Petitioner calling for more detailed treatment by ourselves, we, for the purpose of the present statement of facts, will merely quote from the findings of the Referee with regard to the manner in which the accounts were maintained and deposits made. The Referee found:

> "The testimony definitely shows that the funds constituting these balances were deposited in due course

> of business, that no attempt had been made to build up these balances and no restrictions had been placed on the withdrawal thereof. Neither is there anything in the evidence to show fraud or collusion between the banks and the bankrupt corporation, or between the banks and the guarantors of the notes." (R. p. 19)

This finding was approved by both lower courts (R. pp. 66, 127-8).

The Seizure of the Deposits

On October 16, 1944, the corporation was in need of money. A $25,000.00 note was to come due on that day to the Baltimore National Bank.* The solvency of the corporation depended upon the validity of a number of Government claims which totalled between $400,000.00 and $500,000.00 (R. pp. 84-5; 29). These had been regarded as meritorious by the officers (R. pp. 106-7; 113-4; 116-8) and looking forward to the maturity of the above mentioned $25,000.00 note to the Baltimore National Bank the amount of the claims had been included in a balance sheet which had been prepared for presentation to the bank upon application for renewal of that note (R. p. 106). On the morning of that day, Mr. Lanham, who with Mr. Frost (both of Washington) had been employed to prosecute the claims (R. p. 120), came to Baltimore and informed the officers that he could get no money from the Government at that time, and of the probability of an extended delay in payment (R. pp. 107-8).** After the dis-

---

* This note was renewal of a thirty-day note apparently given on August 15, 1944, for a new loan made at that time (R. pp. 96-7). The method of renewals is explained at R. p. 105. Renewals up to October had apparently been pretty much a matter of course by telephone (R. pp. 103-4).

** The first payment on account of claims thereafter was on the Cedar Point contract on December 6, 1944, in the amount of $45,103.73. That payment is involved in the present settlement and is discussed hereafter.

cussion with Mr. Lanham, Mr. Albert Cummins telephoned to the Baltimore National Bank and then went down to see Mr. Miles, Chairman of the Executive Committee of that bank, and explained the situation to him (R. p. 108). The purpose of the visit was to obtain additional money to tide the corporation over (R. pp. 111-2; 105-8). He took with him Mr. Lanham, and Mr. S. Raymond Machen, present Respondent, who is and was President of the Baltimore Steel Company. It was testified that the Baltimore Steel Company was the largest creditor (R. pp. 107-8).* Mr. Miles was not sympathetic to the application but agreed to wait upon a decision by the First National Bank as to what action should be taken (R. pp. 108-9), and Mr. Cummins, Mr. Lanham and Mr. Machen thereupon set out for that bank (R. pp. 109-110). Upon learning the facts, the First National Bank thereupon called its notes and impounded the deposits in its hands (R. pp. 110-111). The Baltimore National Bank thereupon also impounded the deposit in its hands and applied it against the indebtedness of the $25,000.00 note due on that day (R. p. 111).

The first of the claims involved in the settlement arises out of the action of the banks in impounding the deposits carried against the indebtedness due them. Petitioner disclaims any suggestion that the banks obtained voidable preferences by seizing the deposits as aforesaid (Petitioner's brief p. 7), but claims that the action of the banks in so doing, resulted in preferences to the guarantors.

The $45,103.73 Check

The other transaction giving rise to the settlement arises out of the receipt by the Baltimore National Bank on

* Though the Record does not show it, this statement is not strictly accurate as the indebtedness to one of the banks exceeded that of the Baltimore Steel Company. The comment referred to the largest general creditor.

December 6, 1944, of a check from the Treasurer of the United States, payable to its order as assignee, in the amount of $45,103.73. The details are stated in the Trustee's petition (R. p. 1). The check was delivered under the following circumstances: In 1942 the bankrupt, as joint venturer with Riggs Distler and Company, Inc., a Maryland corporation, had entered into a contract with the United States of America known as Contract NOy-5363, for construction and installation of certain facilities at Cedar Point, Maryland. The joint venturers thereafter executed a loan agreement, and in pursuance thereof an assignment of amounts to become due under said contract to the Baltimore National Bank, to hold as security for certain loans then or thereafter to be made by the Baltimore National Bank and others to the joint venturers. Notice of said assignment was duly filed and acknowledged by the Bureau of Yards and Docks of the Navy Department of the United States on November 24, 1942, (R. pp. 95, 96). Thereafter funds were lent to the joint venturers on account of the said contract. Early in 1943 (R. p. 22) the contract was terminated and in due course all loans which had been negotiated by the joint contractors from the Baltimore National under the loan agreement were paid (R. p. 22). Notwithstanding this, the said loan agreement was never rescinded and funds payable on account of said Contract NOy-5363 to the joint venturers were thereafter paid, as was the above check of the Treasurer of the United States, to the Baltimore National Bank as assignee (R. p. 22). In the meanwhile, the bankrupt had become heavily indebted to the Baltimore National Bank for funds (not involved in the joint venture) and, as above stated, the bankrupt was on October 16, 1944, indebted to the Baltimore National Bank on three notes in the amount of $70,000.00, which balance was reduced on that day, by

seizure of the deposits on hand, to $55,371.24. Each of the notes, which were on printed forms, contained the following provision:

> "At the maturity of this note any and all moneys, stocks, bonds or other securities or property of any nature whatsoever on deposit with or held by, or in the possession of said bank, as collateral or otherwise, to the credit of or for account of the makers, endorsers or other parties hereto, or either or any of them, or in transit to or from the bank by mail or carrier, may be applied forthwith to pay or secure payment of this note or any other indebtedness due said bank by said parties * * *" (R. p. 47).

All the notes had matured prior to December 6, 1944.

Upon receipt of the above mentioned check in the amount of $45,103.73, the Baltimore National Bank, on December 6, 1944, cashed the same and, after delivering one-half thereof to Riggs Distler and Company, Inc. (the joint venturer), applied the other one-half thereof, or $22,551.86 (as the bankrupt's share), against the bankrupt's indebtedness to it (R. pp. 3-5).

It should here be noted that although the assignment was originally obtained by the bank for purpose of securing itself and the syndicate represented by it on account of loans made on the Cedar Point construction project, there was no provision, either in the agreement or in the assignment, specifically prohibiting the bank, after repayment of the loans and the expiration of time for making new loans, from retaining the assignment for another purpose. This comment is made because of the misstatement in the Petitioner's summary statement of the case (at page 5) that by the assignment—

> "sums payable under the joint contract would be paid to the Baltimore bank, as agent, *only* to secure repay-

> ment of the unpaid loans to be made by the bank to the joint venturers for use *only* in the joint undertaking."

Unfortunately there is no copy of the assignment in the printed Record nor is there any copy of the loan agreement, although Petitioner did include an excerpt from the latter (R. p. 52). An excerpt from the assignment is quoted by the District Court in its opinion (R. p. 68). The importance of this omission was understood by this Respondent only after reading the Petitioner's allegations under paragraph "(b)" at page 5 of the summary statement. It should be noted that the Petitioner's comment is unsupported by reference to any part of the Record.

From what has been said, it is apparent that the bank held the $22,551.86 for the benefit of the bankrupt; and it was apparent that the bank was in the position to insist that, by reason of the terms of its notes, then overdue, it was entitled to hold and apply the same to the bankrupt's indebtedness to it. The validity of this position would depend upon whether the bank could establish a lien upon the funds included in the assignment which would extend back of the four-months' period prior to bankruptcy. The Trustee took the position that the application of the $22,551.86 to the indebtedness of the bankrupt constituted a voidable preference. On the other hand, the Baltimore National Bank denied liability and claimed that its action was justified in the premises. While a full discussion of the reasons for its action has never been had with the Baltimore National Bank, the Trustee anticipated possible defenses raised, (1) with regard to the question of notice of insolvency and the actual fact of insolvency at the time of the application of the amount; (2) a claim by the bank that it was entitled to a lien upon the fund either because of the aforementioned assignment or because of the terms

of the notes held by it, which purported to give the bank a lien; or (3) because of a banker's common law lien, or because of a combination of these rights. (And see offer of compromise R. p. 6 and 7). The claim of the bank to a lien, if one existed, would extend to other funds ultimately paid on the Cedar Point contract claim.

The District Court considered the bank's position in its opinion (R. pp. 66-69). It is sufficient here to say that the Trustee was (and is) advised by his counsel that substantial questions of law and fact could be raised in defense against the Trustee's demand for return of the said sum, and that in the absence of a compromise the bank would litigate its liability with regard thereto.

The Agreement with Charles A. Cummins Dated December 8, 1944

One other transaction must be considered. Charles A. Cummins was one of the guarantors. He was the father of Albert Cummins, President, and John Cummins, Vice-President, and related to Harold Cummins (who together constituted the guarantors). Mr. Cummins had for some time ceased to be an officer and did not actively participate in the affairs of the bankrupt (R. pp. 88, 121). After the freezing of the bankrupt's deposits, and in response to a demand by the banks, he and his wife undertook to make a partial payment of the guarantee out of their own funds. Thereafter, on December 8, 1944, he entered into an agreement with the banks (R. pp. 49, 51) in which the other guarantors were also included, the substance of which was that Charles A. Cummins and his wife were to pay to the banks the sum of $86,000.00, and in consideration therefor the banks agreed to release all of the guarantors from any further liability on their guarantees. It was further provided that the banks would not reduce their claims against

the bankrupt by this amount but that any money recovered by them over and above that to which they were entitled would be refunded to Charles A. Cummins and his wife. The Circuit Court of Appeals in describing this transaction made the comment:

> "This was a proper arrangement for if the banks had reduced their claims by $86,000.00, this sum could have been claimed from the bankrupt by Charles A. Cummins." (R. p. 125)

The banks between them filed claim for approximately $105,783.11 in which, by this arrangement, Mr. and Mrs. C. A. Cummins were interested to the extent of $86,000.00, and the banks were interested to the extent of $19,783.11.*

The Offer of Settlement

The offer of settlement, which is the subject matter of the present litigation, is contained in two letters attached to the Trustee's petition (R. pp. 6, 10), and in a third letter written after the filing of the opinion by the District Court (R. p. 71). The Trustee's reasons for recommending the settlement are stated in paragraph "3" of the petition (R. p. 5) and in a full statement made to the Referee (R. p. 20).

Two counsel—Messrs. Patz and Grandberg—had for some time prior to the final hearing before the Referee,

---

* The banks were therefore in the position of becoming completely whole upon the declaration of a 20% dividend and any balance would under the agreement go to Mr. and Mrs. C. A. Cummins. If the $22,511.86 were to be restored by the banks, their total claim filed in the estate would be increased to $128,334.97, in which the bank's interest (assuming that the agreement with Mr. and Mrs. C. A. Cummins covered such a case) would be $42,334.97. Under these circumstances it is obvious that the return of the $22,551.86 later proposed in the offer of settlement was primarily at the expense of Mr. C. A. Cummins and his wife and not of the banks.

evinced an interest in the possible liability of the guarantors. Knowing of their interest, counsel for the Trustee invited them to be present and take part in the special examination of the bankrupt's officers; and both attended and took part in that examination (R. p. 76). Later, prior to recommending settlement, these individuals were informed of the Trustee's decision that the evidence would not support an action against the banks or the guarantors on account of the October 16, 1944, bank seizures; and they were requested to offer or disclose to the Trustee any additional evidence which they might have. At the hearing on the petition for authority to make the settlement, a very full statement was made by counsel of the results of the investigation made by the Trustee and reasons for the recommendation (R. p. 20). Counsel for the creditors was again called on to produce any additional evidence available (R. pp. 38-39). Mr. Patz did not stay for the full hearing but left Mr. Grandberg to take his place (R. p. 21). Mr. Grandberg admitted that he had no additional facts to offer to the Trustee but suggested that Mr. Patz had additional facts which were withheld (R. p. 39). We now quote from pages 39-40 of the Record:

> "(Mr. Grandberg) All the facts are not developed in that testimony. I think you will find that the cross examination was very short and you were permitted to go on with your own examination in chief and we did not develop our case at all.
>
> (Mr. Page) You mean you withheld?
>
> (Mr. Grandberg) We withheld cross examination of the various endorsers.
>
> (Mr. Page) Why, Mr. Grandberg?
>
> (Mr. Grandberg) Well, that seemed to be the strategy worked out at that time."

The Referee, after review of the entire matter, came to the following conclusion:

> "In the opinion of the Referee, the contents of the Trustee's petition for ratification of the offer of settlement were fully supported by the testimony and said offer should be accepted and ratified." (R. p. 19)

In the presentation of the case before the District Court, the matter was fully briefed and all aspects of the case were discussed in detail. The District Court came to the following conclusion:

> "The situation with which the trustee in bankruptcy was faced is very clearly and accurately stated by his counsel in their brief, as follows, and we are satisfied that their judgment was sound in advising the trustee in bankruptcy to accept the proposal with the sole qualification with respect to the interest item just discussed: 'Prior to determining to accept the offer the Trustee decided that he could probably win a contest against the Baltimore National Bank for restoration of the $22,551.87; and that, in the absence of facts unknown to him, he would fail on claims against either the banks or the guarantors on account of the October 16, 1944, transactions. During the investigation, the Trustee requested Mr. Grandberg, who was, together with Mr. Patz, representing dissenting creditors, to submit to the Trustee any additional facts known to them, and upon failure of them so to do, the Trustee has no reason to believe that any facts exist which would change the conclusions reached by him on his independent investigation. Having made the conclusions stated, the Trustee recommended the compromise settlement which will, in effect, require repayment of 100% of what the Trustee believes he is entitled to recover' " (R. pp. 69-70).

The matter was thereupon carefully reviewed by the Circuit Court of Appeals, which affirmed the action of the District Court (R. pp. 124-132).

The Institution of Suits Pendente Lite

Subsequent to the decision of the Referee ordering the acceptance of the compromise agreement, the objecting creditors, having entered an appeal from the said order, were permitted, pending the decision of the Court, to enter a suit in behalf of the estate against the guarantors. In the same manner, the Trustee, pending a final decision with regard to the compromise agreement, instituted a suit against the Baltimore National Bank to recover the $22,-551.86 seized by it on December 6, 1944; and also filed exceptions to the claim of that bank as a general creditor, for the same reason. The purpose of all of these actions was to avoid the bar of limitations pending a final determination of the creditors' objections to the compromise agreement (R. pp. 73, 20). The effect of a ratification of the compromise agreement will be to cause the dismissal of these various actions.

ERROR IN PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

There are numerous inaccuracies in the Petitioner's Statement of Facts which will be considered in more detail in the appendix. The petition as a whole is prepared, however, upon an apparent misconception of the matters which are open for consideration of this Court.

(a) The Petitioner assumes that it is at liberty to question the good faith of the Trustee in recommending the settlement and in substance suggests that the settlement was nothing but a sham. Up until the present petition, the comments designed to reflect upon the Trustee's good faith have been oblique and no direct charge has been made. In the present petition, however, the following comment appears as part of two extremely offensive paragraphs of the Petitioner's brief (at page 2):

> "It is an almost irresistible conclusion drawn from the above, that the Trustee in this case is seeking, without possible gain to the estate, to free the guarantors from the necessity otherwise of responding in the pending plenary actions filed against them, is indeed appearing for the guarantors."

While the Trustee will not indulge in a formal motion to have this matter stricken out, it is believed proper to suggest that it is not only slanderous and impertinent as to the Trustee but apparently also includes in its scope the Referee, and both lower courts, who, after full hearings, have ratified and confirmed the Trustee's recommendations.

(b) The Petitioner assumes that it is still at liberty to discuss the good faith of certain of the guarantors and suggests that they caused the deposits in the Baltimore National Bank to be built up prior to October 16, 1944, for the purpose of permitting a set-off (Petition, pp. 3-4; Brief, p. 15). In this respect the Circuit Court of Appeals said:

> "Nothing has been brought to our attention to cast any doubt upon the finding of the Referee, approved by the District Judge, that 'the testimony definitely shows that the funds constituting these balances were deposited in due course of business, that no attempt had been made to build up these balances and no restriction had been placed upon the withdrawal thereof. Neither is there anything in the evidence to show fraud or collusion between the banks and the bankrupt corporation, or between the banks and the guarantors of the notes' " (R. pp. 127-128).

(c) These errors are reflected in questions 1 and 3 of the Petitioner's statement of Questions Presented (Petition, p. 8). We take question 1 as an example:

> "Where it is conceded that only the sum of money admittedly recoverable under any circumstances from

> the Baltimore bank is offered to the Trustee, should the Trustee, without any further consideration whatsoever, extend a release from the estate to four solvent, individual guarantors against whom the estate has (at the very least) a colorable claim for $68,500?"

This question in substance assumes that the compromise agreement was nothing but a sham of the character discussed in paragraph "(a)" above. Trustee had been advised by counsel that he would probably be successful in an action against the bank to recover the $22,551.86, which had been seized by it on December 6, 1944. On the other hand, neither the Trustee nor counsel have ever at any time "conceded" or "admitted" that the fund was "recoverable under any circumstances"; and at all times counsel for the Trustee have made clear that they recognized the possibility of a substantial and aggressive defense in any suit by the Trustee against the bank. The fact that the Trustee has not attempted to magnify these defenses but has contented himself with a frank statement that in opinion of counsel they could be overcome, has been seized upon by Petitioner as in substance a concession that the Trustee was getting nothing of value in the compromise settlement, and that the money would have been forthcoming in any event from the bank. That is not the case; and it is believed that the bank would have tested its rights by litigation, if no compromise had been effected. This in substance was the tenor of the comments made by the Baltimore National Bank in the offer of settlement; and it was confirmed by advice of the Trustee's counsel. The Trustee was advised, and is still advised, that the bank (and Charles A. Cummins, who was, of course, the person primarily affected) made a substantial concession when they agreed to repay the amount of the claim to the estate as a voidable preference. The Referee and the lower courts carefully reviewed the whole matter and found that the

proposed agreement was for the best interests of the estate. Under these circumstances the Petitioner should not now suggest that the whole transaction was a sham; or frame a question to this Court based upon such an assumption.

In the same manner, the error mentioned in paragraph "(b)" is carried into the above question in which the Petitioner includes an assumption that—

> "the estate has (at the very least) a colorable claim for $68,500.00".

The colorable claim could arise only in one of two ways: Either (1) upon proof that the guarantors had "built up" the deposits or in some way acted out of due course or in bad faith in making the deposits at the banks; or (2) upon the Petitioner's establishing *as a matter of law* that the guarantors received a preference without regard to the good faith and ordinary course in which the deposits were made. As above pointed out in paragraph "(b)", the first of these questions, which is one of fact, has been eliminated. Hence the Petitioner can develop a claim only upon establishing the matter of law. That matter of law is presented and properly stated in Petitioner's Question (2). If Petitioner's position on Question (2) is correct, the estate has more than a colorable claim: if incorrect, it has no claim at all, which is what the lower court found. Hence Question (1) merely confuses the issue and suggests an attempt to include in the matters presented to this Court the question of fact which at present is no longer open.

For these reasons the first question proposed is defective. In like manner, the third question suggested by Petitioner is defective for the same reasons.

Respondent therefore submits that both Question (1) and Question (3) improperly state the issues involved, and are not basis for issue of the writ.

THE RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

The second question set forth by the Petitioner's statement of "Questions Presented" does not suffer from the defect apparent in the other two questions. It reads:

> "Under section 60 of the Bankruptcy Act, regardless of the statutory right of set-off (permitted by section 68 between those having mutual debts or credits) allowed to the Baltimore banks, by which they applied the Bankrupt's balances in reduction of the note indebtedness, did not the guarantors, by reason of the enlarged scope and meaning of 'transfer' enacted by the Chandler Amendment in 1938, obtain a benefit, which is a voidable preference?"

Respondent offers no objection to this statement of law as the only question presented.

RESPONDENT'S POSITION ON THE MERITS OF THE PETITION

The decision of the lower court on the question of law presented by this petition for certiorari is fully sustained by the prior decisions of the same circuit, in the Lineberger and Crabtree cases, which are fully discussed by the Circuit Court of Appeals in its opinion (R. pp. 129, 130). These cases, and the decision in the present case, are not inconsistent with decisions in other circuits but are to the contrary in accord with the principles stated in a mass of decisions of the Supreme Court and other circuits, all as is more fully pointed out by the Circuit Court of Appeals in its opinion and by the District Court in its opinion.

The Trustee, in recommending the acceptance of the offer of compromise and throughout the litigation, has assumed that under the established law the *bona fide* action of the officers of the bank in permitting deposits to be made at the banks in regular course of business was not

a "transfer" within the meaning of the Bankruptcy Act. In view of the history of the Chandler Act amendments and the comments by text-book writers, it has also assumed that the Chandler Act did not effect any change in so far as this question is concerned. If the Trustee is in error in this regard and deposits so made are in fact transfers, then the Trustee will readily admit that the settlement is under the circumstances inadvisable. It is only because the Trustee has been advised that there is no reasonable possibility that the courts will reconsider their decisions in these cases that the Trustee has recommended the settlement. This was frankly stated by the Trustee to the Referee and both lower courts. Their approval of the Trustee's recommendation indicated their agreement with this conclusion. On the other hand, there is no harm in the Petitioner's asking this Court to reconsider that question, and the Trustee therefore offers no objection whatsoever to the presentation of the point of law presented by Petitioner's Question (2), if this Court believes that there may be any merit in the Petitioner's contention.

CONCLUSION

The Respondent strenuously opposes the grant of the writ based on Petitioner's Questions (1) and (3) on the ground that these questions are improper, and impertinent. He has no objection to the grant of the writ based on Question (2).

Respectfully submitted,

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CHARLES G. PAGE,
Attorneys for S. Raymond Machen, Trustee in Bankruptcy of Cummins Construction Corporation.

APPENDIX

INACCURACIES AND MISSTATEMENTS IN THE PETITION AND IN THE PETITIONER'S BRIEF

It should be noted that the Petitioner offered no testimony at the hearing before the Referee, printed no testimony to support his contentions before the Circuit Court of Appeals,* and that Petitioner gives almost no references to the Record to support its Statement of Facts. Furthermore, Petitioner is fully aware of Respondent's objections to Petitioner's Statement of Facts, because in the court below, upon a somewhat similar misstatement of the facts, Respondent was forced to devote a section of his brief to the subject.**

Yet Petitioner glibly opens its summary statement of facts by the announcement that—

> "The pivotal matters of facts here involved are so free of dispute as to be virtually stipulated" (Petition, p. 3).

The error goes deeper. Petitioner's main object in both the statement of facts (Petition p. 3), the statement of "Questions Presented" (Petition p. 8), and in the "Introductory" part of the brief (Brief, pp. 1-5), is apparently to so state (misstate) the facts as to demonstrate, (1) that the deposits at the two banks were "built up" for the express purpose of relieving the guarantors of liability; and (2) that the proposed compromise was nothing but a sham,

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* All oral testimony in the Record was printed at the request of the Respondent.

** See comments on Petitioner's "Statement of Facts" in Respondent's brief before the Court of Appeals at page 11 *et seq.*, where most of the misstatements below were particularized with references to the Record.

concocted by the Trustee to relieve the guarantors of liability. The holding of the Referee and the two lower courts is flatly contrary on both points. As to (1), all of these officials held that the evidence established that there was no building up or bad faith in making the deposits (see particularly Circuit Court of Appeals' opinion, R. p. 127-128). As to (2), the approval by the Referee and both lower courts of the proposed offer, is a certification to this Court that the proposed compromise was not a sham; and that the Trustee was fully justified in his actions (see particularly Referee's opinion, R. p. 19; District Court's opinion, R. p. 69-70).

Hence, while the testimony discloses no conflict of fact, Petitioner's *statement* of facts is definitely in conflict with Respondent's statement. The pivotal facts as recited by Petitioner are not "virtually stipulated"; and are in conflict with the Record and the findings of fact of the Referee and the two lower courts.

We now turn to certain of the details in the statement which are inaccurate and find that almost every clause in the first paragraph is wholly or partially in error.

(1)

Petitioner in its first sentence on the facts states:

> "for months prior to the adjudication on January 4th, 1945, it (the bankrupt) had ceased to function as an active and going concern," (Petition, pp. 3-4).

The "pivotal" period in the present case is the period from September 4, 1944, which commenced the four months' preference period, up to October 16, 1944, when the banks seized the deposits. We take it that Petitioner's statement is intended to be interpreted to cover that period. There is no Record citation and there is nothing in the Record to support the statement. As a matter of fact, the contrary is

quite evident. The ledger accounts of the various banks were offered in evidence (R. p. 79 *et seq.*) and the larger deposits from September 4, 1944, were analyzed (R. p. 81). Deposits at the First National Bank showed substantial payments from the following sources for construction work during this period: September 1st, Baltimore Pure Rye $5,271.00; September 2nd, Greyhound Bus Company $25,000.00, Rustless Iron and Steel $50,000.00; September 16th, Maryland Glass $1,274.00, Greyhound $188.00; September 20th, Bethlehem Fairfield $7,211.40; September 21st, Degman $26,795.43, Chevrolet $8,000.00; September 25th, Paul Jones Distillery $1,100.00, Emerson Hotel $351.00; September 29th, Reliable Stores $6,000.00, Bethlehem Fairfield $460.00, Baltimore Pure Rye $729.00; October 2nd, Rustless Iron and Steel $6,500.00, Eastern Stainless Steel $2,500.00, Ivy City job (Washington) $4,367.00; October 7th, Bethlehem Fairfield $31,900.00; October 10th, Eastern Stainless Steel $2,907.47; October 13th, Mount Vernon Woodberry Mills $20,534.00, Eastern Stainless Steel, about $6,700.00, Maryland Glass $4,200.00, Rustless Iron and Steel $5,600.00 (R. pp. 81-87). And at the Baltimore National Bank: September 13, 1944, Miscellaneous items from Westinghouse, Emerson Drug, Reading Sales, Mount Vernon Woodberry Mills, Oriole Cafeteria, $5,340.00; October 6th, Emerson Drug Company and Rustless Iron and Steel, $25,726.04 (R. p. 91); September 25th, Edgewood Arsenal (Government) $10,000.00 (R. p. 93). And at the Maryland Trust Company: September 7, 1944, Chevrolet $11,246.00, Maryland Ice $300.00, Maryland Drydock $3,500.00, Greyhound Bus Terminal $10,000.00 (R. p. 99).

Petitioner was represented at the taking of this testimony (R. p. 76). It is obvious from the above that the bankrupt was actively engaged in construction work during the period up to the freezing of its accounts on October 16, 1944.

(2)

Petitioner states in the next clause:

> "it (the bankrupt) had long been pressed by its outstanding creditors for payment" (Petition, p. 4).

We assume that this is intended to apply to the same period (September 4th - October 16th, 1944). Here again the Petitioner is in error. There is, of course, evidence that the bankrupt was in need of money. But the bank accounts introduced in evidence show large disbursal of funds, as the same were collected, up until October 16, 1944; and on the very day when the bank accounts were frozen there were $23,000.00 in outstanding checks to clear (R. p. 85-87). While these checks were, of course, refused by the banks, it is obvious that the business was not at a standstill as suggested by the Petitioner.

(3)

Petitioner next states:

> "a large Government contract had been earlier terminated" (Petition, p. 4).

This is obviously inserted to indicate that the concern was hanging on by its eyeteeth as a result of the termination. The large Government contract referred to was the Cedar Point contract, which had been terminated for the convenience of the Government *early in 1943* (R. p. 22). There is no evidence whatsoever that this termination had anything whatsoever to do with the bankrupt's condition in the fall of 1944; or in fact that the contract itself was carried on at a loss.

(4)

Capitalizing on the above mentioned misstatements, "(1)" to "(3)", Petitioner finally, at the close of his brief, makes the following argument:

"In the cause at bar it is equally evident that the Guarantors received a preferential benefit; though of course since they were in active control of the bankrupt *and now admitted to have had prior knowledge of its insolvency (or better than reasonable cause to believe that the debtor was insolvent)* these Guarantors may also be said to have induced or brought about a situation, *by continuing* to make deposits in the Banks holding the bankrupt's indebtedness guaranteed by them, as a result of which they obtained these benefits * * *" (Petitioner's Brief, p. 15). (Italics ours.)

It is needless to say that the Respondent has made no such admission.*

(5)

Petitioner at page 4 of the petition states:

"With knowledge of the right of the two Banks to apply or set-off any balances in bank in reduction of the corporation's outstanding note obligations held by such Banks (which application would reduce the individual liability of the Messrs. Cummins as guarantors) the Officers (Guarantors also) continued in the weeks prior to October 16th, 1944, to make deposits of corporate funds in such Banks, though they also maintained a third depositary, to which Bank the Company was not indebted (R. 32)."

This again is inaccurate. The evidence shows that the Treasurer of the corporation was Mr. Brannan (R. p. 89); but that the responsibility for making the deposits was in

* In making the above comment, it should be borne in mind that the courts declare that mere knowledge of insolvency, in and of itself, is insufficient to transmute a deposit, otherwise in good faith and in ordinary course, into a preference. This state of the authorities does not, however, justify the Petitioner in easing the burden of its contention by stating, as though they were admitted, facts which are not apparent from the Record, and which it would no doubt have the greatest difficulty in proving.

the Assistant Treasurer, Mr. Hart (R. p. 78-79). Neither of these persons were guarantors. While there perhaps can be no doubt that Mr. Hart would have obeyed instructions if told by Albert Cummins to deposit particular money at any particular location, his testimony was that he acted on his own discretion without instructions from them (R. p. 78-79; 90-91). There is no evidence to the contrary.

(6)

Petitioner at various places speaks generally of the guarantors as officers, directors and stockholders; as though all occupied each position. Actually an important exception was Charles Cummins, who was not an officer (R. p. 88); was not active in business (R. p. 121-2). There is no evidence to show that he was a director.

(7)

Petitioner speaks of the assignment by the bankrupt to the Baltimore National Bank of proceeds of the Cedar Point contract as "inadvertently unrevoked" (Petition, p. 4). There is nothing in the Record to support the comment that the failure to revoke was inadvertent; and Petitioner was so advised by Respondent's brief before the Circuit Court of Appeals at page 13.

(8)

In an effort to substantiate its claim that the Baltimore National Bank did not "under any circumstances" have a claim to retain the $22,551.86 seized by it on December 6, 1944, Petitioner refers to the assignment to the bank as one—

> "by which sums payable under the joint contract would be paid to the Baltimore bank, as agent, *only* to secure

> repayment of the unpaid loans to be made by the Banks to the joint venturers for use *only* in the joint undertaking;" (Petition, p. 5). (Italics are Petitioner's.)

There is no citation to the Record to support this comment.

Petitioner did not include the assignment in the printed Record; and only included an excerpt from the loan agreement (R. p. 52). There is nothing which we know of in either document which makes any statement to the above effect. While it is doubtless true that the bank held the assignment for the benefit of the banking syndicate to secure loans made by the syndicate, those loans had been repaid and time for new loans had expired. There was nothing in the agreement which specifically provided that the bank could not thereafter, by agreement, hold the bankrupt's share for its own security. Later the bank made its claim to a right to retain the funds on that very ground, under the terms of its notes (see offer of settlement, R. pp. 6, 7-8; form of note, R. p. 46). While the Trustee announced to the Court that he was advised that the bank's claim could be overcome, the fact was not conceded by the bank and it was recognized by the Trustee that litigation would be necessary to establish the fact. Hence we take issue with the above statement by Petitioner as one of those facts "virtually conceded"; and particularly so when the statement is used as a basis to later allege in the statement of "Questions Presented" that—

> "*it is conceded* that only the sum of money *admittedly recoverable under any circumstances* from the Baltimore bank is offered to the Trustee" (Petition, p. 8). (Italics ours.)

as consideration for the settlement.

(9)

The Petitioner's statement of facts recites:

> "Numerous creditors opposed such alleged compromise, in behalf of whom these Petitioners are acting" (Petition, p. 6).

Of course the Petitioner's action, if successful, would benefit all creditors. As Petitioner says, creditors' claims exceeded $410,000.00 (Petitioner's Brief, p. 4). We take the Petitioner's statement, however, to infer that Petitioner is merely one of a large number of objecting creditors who are acting jointly in filing this petition. The Record indicates the contrary. Objections were originally made by twenty-two clients of Messrs. Patz and Grandberg (R. p. 14-15). The eleven creditors represented by Mr. Grandberg did not appeal from the Referee's order. Of those represented by Mr. Patz, only two appealed from the Referee (R. p. 15). Those two later appealed from the District Court to the Circuit Court of Appeals (R. p. 123). Mr. Grandberg's appearance was not entered in that appeal (R. p. 123) nor does he appear here either as attorney or of counsel. The present petition is filed by only one of the two creditors who appealed to the Circuit Court of Appeals. Unfortunately, we are unable to state either the amount of the present Petitioner's claim against the bankrupt estate, or the reason for the failure of the other creditors to join in the present petition; because neither fact is a part of the Record in this proceeding. Suffice to say, that the Record does not show that the Petitioner appears for anyone but itself and this Respondent is unwilling to accept the statement of Petitioner for more than what the Record shows.

(10)

Finally in the Petitioner's brief there are further statements of facts which are made at the top of page 2 of Petitioner's brief to the effect that the Trustee is

> "a close personal friend and sometime business associate of the guarantors".

This is a repetition of a statement made in the court below which was designed to reflect on the good faith of the Trustee. The nearest approach to any evidence in this regard in the transcript was the testimony that Mr. Machen went with Albert Cummins to the Baltimore National Bank on October 16th in an effort to obtain an extension of credit from the bank (R. p. 107-108). Mr. Albert Cummins, President of the bankrupt, then testified:

> "Q. In what capacity did Mr. Machen go with you? A. I guess it was more or less as a friend and a large creditor at the time.
>
> Q. He was an officer of the Baltimore Steel Company, which is the largest creditor? A. Which is the largest creditor we have."*

There is no testimony of any character that the Trustee was a "sometime business associate of the guarantors". With these comments as a background, the Petitioner goes on to say:

> "Ordinarily it would be expected that a Trustee in bankruptcy would not be so zealous as to come to the aid of challenged recipients of preferences.
>
> "It is an almost irresistible conclusion, drawn from the above, that the Trustee in this case in seeking, without possible gain to the estate, to free the Guarantors from the necessity otherwise of responding in

* Though the Record does not show it, this statement is not strictly accurate, as the indebtedness to one of the banks exceeded that to the Baltimore Steel Company.

> the pending plenary actions filed against them, is indeed appearing for the Guarantors" (Petitioner's Brief, p. 2).

Comment has already been made on these scandalous and unsubstantiated allegations. Suffice to here again point out that the actions of the Trustee were based on specific recommendations of his counsel who assumed full responsibility therefore (R. p. 44). His recommendations have been carefully scrutinized by the Referee, and the courts below; and by their approval and ratification, the acts complained of have become the acts of those officials.